

No. SC93471

IN THE MISSOURI SUPREME COURT

MELODY FRYE,

Respondent,

v.

**RONALD J. LEVY, DIRECTOR,
STATE OF MISSOURI DEPARTMENT OF SOCIAL SERVICES,
CHILDREN'S DIVISION,**

Appellant.

**Appeal from the Thirty-Seventh Judicial Circuit, Howell County,
Missouri, Honorable Michael Ligons, Associate Circuit Judge**

**SUBSTITUTE REPLY BRIEF OF APPELLANT
DIRECTOR OF DEPARTMENT OF SOCIAL SERVICES**

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ARGUMENT

Transfer was properly granted

Melody Frye argues that this Court should rescind its transfer order as improvidently granted because the Director of the Department of Social Services has not answered six questions Frye believes are germane to this appeal. Respondent’s Substitute Brief 11. All the questions involve whether “good cause” exists to delay concluding the Children’s Division’s investigation beyond thirty days after receipt of the report of neglect allegedly perpetrated by Frye. § 210.145.14; A7.

But the trial court did not decide whether good cause for a delayed conclusion exists, likely because the Division did not conclude its investigation and notify Frye of its conclusion between thirty and ninety days after receipt of the report. Rather, the trial court based its judgment on the fact that the Division concluded its investigation one hundred days, and notified Frye of its conclusion one hundred three days, after receipt of the report. § 210.152.2; A3 ¶¶9, 10; A5 ¶¶23, 24; A8.¹

¹ The trial court also concluded that the Division failed to “update its information system justifying a continuing need for investigation beyond the 30 day deadline of when the complaint was received on May 17, 2006.” A5 ¶22. But the Division updated its information system with good cause for a

The only issue for this Court is whether the Division must conclude an investigation of a report of child abuse or neglect and notify the alleged perpetrator of its conclusion within ninety days of receipt of the report.

Ninety days is directory

Frye argues that the ninety day time limit is mandatory because the statute establishing the time limit does not contain any exception, including a good cause exception. § 210.152.2; A8; Respondent's Substitute Brief 11–12. But as pointed out in the Director's opening brief at pages 17–18 and 25–26, ninety days is directory, because ninety days is a time limit on administrative decision making and because child abuse and neglect statutes are remedial in nature. The state of Maryland agrees.

Maryland, like Missouri, has a statute that places a time limit on concluding investigations of reports of child abuse and neglect — sixty days from receipt of a report. Md. Code, Fam. Law § 5–706(h)(2) (2012). Because

delayed conclusion — needed medical and police reports cannot be obtained at this time, and Frye had not yet been interviewed about the report of neglect against her — *before and after* the thirtieth day: twenty–two days (June 8) and twenty–six days (June 12), and then thirty–five days (June 21) and forty days (June 26), after receipt of the report. Appellant's Substitute Brief 7–8, 16, 18 n.6; LFI77–80.

the statute, like Missouri's statute, does not provide for a sanction for noncompliance with the sixty-day requirement, a Maryland court looked to "the overall purpose of the statute to determine whether dismissal [of the finding of neglect] would further the statute's purpose." *Owens v. Prince George's County Dept. of Soc. Servs.*, 957 A.2d 191, 192 199 (Md. Spec. App. 2008). The court held that when delayed conclusions occur, the statute's remedial purpose of protecting children would not be served by dismissal of findings of neglect.

The express purpose of the 60 day provisions ... is to protect children by attempting to ensure that after a report of neglect of abuse comes to the attention of the Department, more than 60 days should not elapse before a report is completed by the Department. Nothing in the subtitle indicates that its purpose is to protect persons charged with neglect or abuse. Instead, ..., the purpose is to protect neglect and abuse victims.

....

The purpose of [the statute] is to protect children — not to protect persons alleged to have neglect or abused children. That purpose will not be served by dismissing charges in cases where the Department fails to complete its investigation within 60 days.

Owens, 957 A.2d at 199, 202 (investigation concluded 142 days after receipt of report). The Maryland court’s reasoning applies equally as well here in Missouri, where this Court has declared that the purpose of the child abuse and neglect statutes is to protect children. *Jamison v. Department of Soc. Servs.*, 218 S.W.3d 399, 402, 410 (Mo. 2007). The statutes are not intended to protect alleged perpetrators.

The cases Frye cites at page 21 of her brief are significant only because they point to an instance where the Missouri legislature *did* mandate that a certain result follow from the failure of an agency to decide within a statutory time limit. The statute approves, by operation of law, an application for a certificate of need when a decision on the application is not made by the agency within the statutorily allotted time. § 197.330.1(4); § 197.330.2. No similar statute exists for delayed conclusions to child abuse and neglect investigations.

Frye also argues that the ninety day time limit is mandatory because in cases “pitting the police power against the citizen’s rights, the ‘no consequences, no mandate’ nostrum falls away” and “where due process interest are involved, ‘shall’ is deemed mandatory.” Respondent’s Substitute Brief 19. “The function of police power is to preserve the health, welfare and safety of the people by regulating all threats harmful to the public interest.”

State v. Richard, 298 S.W.3d 529, 532 (Mo. 2009).² The state’s police power is broad enough to include child abuse and neglect investigations. But those investigations are not criminal in nature, as Frye suggests throughout her brief. *Doe v. Department of Soc. Servs.*, 71 S.W.3d 648, 651 (Mo.App. E.D. 2002) (“greater tolerance afforded enactments with civil rather than criminal penalties”).

And, contrary to what Frye argues at note 7 on page 17 of her brief, child abuse and neglect investigations do not affect parents’ fundamental liberty interest in the care, custody, and management of their child.³ Investigations that conclude child abuse or neglect existed, if upheld on administrative and de novo judicial review or if review is not sought, result *only* in perpetrators’ names being placed in the Central Registry of child

² Contrary to Frye’s assertion at note 5 on page 17 of her brief, laws protecting the environment and compensating injured workers are an exercise of the power to regulate “threats harmful to the public interest.” *Richard*, 293 S.W.3d at 532.

³ As pointed out in the Director’s opening brief at pages 19–21, the alleged perpetrator has no procedural due process rights during investigations. *Artman v. State Bd. of Registration for the Healing Arts*, 918 S.W.2d 247, 250–51 (Mo. 1996).

abuse and neglect perpetrators. Investigations do not result in the removal, either temporary or permanent, of the child from her parents. The Division has no authority to remove a child from her parents. Nor does the Division have authority to order or compel parents to accept services that strengthen the family unit or to enter into a safety plan that protects the child from risk of harm by, for example, limiting a parent's or others' contact with the child.

Frye also argues that placing her name in the Central Registry is “tantamount” to termination of her parental rights and makes the remarkable assertion: “Juvenile courts are empowered to restrict parental rights on the grounds of the parent's listing within the Central Registry. RSMo § 211.031.1(1)(a).” Respondent's Substitute Brief at 19. This is false.

Merely having one's name in the Central Registry is *not* a ground for termination of parental rights. § 211.447.2(2),(3); § 211.447.5(1)–(6); § 211.447.6. Neither is a juvenile court's mere assumption of jurisdiction over a child because of abuse or neglect a ground for termination.

§ 211.031.1(1)(a); *In re K.A.W.*, 133 S.W.3d 1, 9–10 (Mo. 2004). A juvenile court cannot assume jurisdiction over a child without 1) the filing of a petition that sets forth “with reasonable particularity ... facts ... including the date, place and manner of the acts alleged;” and 2) if denied, hearing “evidence on the petition.” Rule 113.01(b)(3); Rule 116.03. And the Division

has no authority to file a petition for a juvenile court to assume jurisdiction over a child.

The statutes that limit the time to conclude child abuse and neglect investigations are directory, not mandatory. They are intended to protect children, not alleged perpetrators. Child abuse and neglect investigations do not impinge upon either the fundamental or the procedural due process rights of parents.

Frye is not prejudiced

Any “familial hardships,” Respondent’s Substitute Brief 22, endured by Frye is not prejudice resulting from the Division’s delayed conclusion. Presumably, Frye is referring to her decision to move out of the family home with Jaycee Hardin’s siblings and live with Frye’s mother, made, Frye says, because the Division “insisted.” Respondent’s Substitute Brief 6. But Frye decided to live with her mother during the first week of the investigation. And in any event, as mentioned above, the Division could not order or compel Frye to move from her home.

On May 17, 2006, the Division’s investigator visited Frye and Jaycee Hardin’s siblings in the hospital to inform Frye about the report of abuse allegedly perpetrated by her husband and to speak to the siblings. LFI28. The investigator told Frye that someone would speak with her about the report later. LFI28. On May 23, the juvenile officer urged the Division’s

investigator to ask Frye to sign a safety plan to not allow contact between Frye's husband (in jail charged with Jaycee Hardin's homicide LFI32) and the siblings. LFI31,35. The juvenile officer also urged the investigator to encourage Frye to accept services. LFI31, 35. Sitting on the front porch of her home, Frye agreed to the safety plan and services that day. LFI31–32. On May 24, the investigator informed Frye about the report of neglect alleged to be perpetrated by her and told her that she would speak to her about that report later. LFI35. At this meeting, Frye told the investigator that she and the siblings would be living with Frye's mother. LFI35. Neither the juvenile officer nor the juvenile court took the siblings into protective custody. LFI72–73, 74.

Merely being the subject of an investigation, even a delayed one, is not prejudice. Frye's early decision to live with her mother was solely her own, as was Frye's early decisions to accept services and to agree to a safety plan to prevent contact between Frye's husband and the siblings. Frye was not prejudiced by the Division's delayed conclusion to its investigation.

CONCLUSION

For the reasons stated above, the judgment should be reversed and this case remanded to the circuit court.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that the Substitute Reply Brief of Appellant Director of Department of Social Services was filed electronically and served via Missouri CaseNet this 3rd day of October, 2013, upon George (Chrys) Fisher, Jr.

I hereby certify that I signed the original of this brief and that it contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06 (b), and contains 1,906 words exclusive of cover, signature block, and certificates.

/s/ Gary L. Gardner